No. 82-1083

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF SOUTH DAKOTA,
Petitioner,

v.

BURTON LOHNES,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH DAKOTA SUPREME COURT

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QUESTIONS PRESENTED

Whether the due process clause of the Fourteenth Amendment in a non-death penalty first degree murder trial requires the trial court to instruct the jury on second degree murder when second degree murder is not a necessarily included offense of first degree murder, when conviction of first degree murder or second degree murder will result in the same mandatory sentence, when the evidence will not sustain an instruction on second degree murder, and when instructions on all necessarily included offenses of first degree murder are given?

Whether the South Dakota Supreme Court has the authority to order a confession from a juvenile suppressed on the basis of deliberate delay by law enforcement officials in bringing the juvenile before a Judge after his arrest and on the basis of the failure of law

enforcement officials to advise the juvenile that his confession could be used in an adult criminal prosecution for murder, when both bases arise from the court's construction and enforcement of South Dakota statutes?

TABLE OF AUTHORITIES

STATUTES	PAGE
SDCL §22-16-7 (1980)	6, 8
SDCL §23A-4-1 (1978)	2, 9
SDCL §23A-27A-1 (1979)	5
SDCL §23A-27A-4 (1979)	2, 5
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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent submits the following portions of the South Dakota Codified Laws are relevant, in addition to the portions quoted by Petitioner:

> S.D.C.L. §22-6-1 (1980). Except as otherwise provided by law, felonies are divided into the following eight classes which are distinguishable from each other by the respective maximum penalties hereinafter set forth which are authorized

upon conviction:

(1) Class A felony: death or life imprisonment in the State Penitentiary. A lesser sentence than death or life imprisonment may not be given for a Class A felony.
(2) Class B felony: life imprisonment in the State Penitentiary. A lesser sentence may not be given for a Class B felony.
(3) ....

S.D.C.L. §23A-27A-4 (1979). If upon trial by jury, a person is convicted of a Class A felony, a sentence of death shall not be imposed unless the jury verdict at the presentence hearing includes a finding of at least one aggravating circumstance and a recommendation that such a sentence be imposed....

S.D.C.L. §23A-4-1 (1978). A law enforcement officer making an arrest shall, without unnecessary delay, take the arrested person before the nearest available committing magistrate.

S.D.C.L. §26-8-57 (1978). No adjudication, disposition, or evidence given in proceedings brought under this chapter shall be admissible against a child in any criminal or other action

> or proceeding, except in subsequent proceedings under this chapter concerning the same child and subsequent criminal proceedings for sentencing purposes on a felony charge.
>
> S.D.C.L. §2-14-13 (1939). Whenever a statute appears in the code of laws enacted by §2-16-3 which, from its title, text, or source note, appears to be a uniform law, it shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

STATEMENT OF THE CASE

Respondent accepts the Statement of the case as set forth in the Petition for Writ of Certiorari, at 2 to 3. Respondent would also add the statement of this case by the South Dakota Supreme Court appearing in the Appendix to the Petition for Certiorari, at A-1 to A-5.

REASONS FOR DENYING THE PETITION

1. The South Dakota Supreme Court Has not Decided a Federal Question in a Way in Conflict with Applicable Decisions of this Court.

a. This Case is not in Conflict with Beck v. Alabama or Hopper v. Evans.

This case is distinquishable from Beck v. Alabama, 477 U.S. 625 (1980), in several respects.

First of all, this case did not involve the death penalty as Beck did. Defendant was charged in an information alleging premeditated first degree murder. Appendix to Petition for Certiorari [hereinafter "App. to Pet."], A-1. Although premeditated murder is punished in South Dakota by either death or life-imprisonment (S.D.C.L. §22-16-4 [1979]), a conviction of premeditated murder could carry a death penalty only if the State could prove some aggravating

circumstances under S.D.C.L. §23A-27A-1. See S.D.C.L. §23A-27A-4 (1979). In this case, the State conceded there were no aggravating circumstances and had, prior to trial, waived its right to seek the death penalty should the jury convict of first degree murder. Consequently, in this case second degree murder was not a lesser offense than first degree murder, since both carried the same mandatory sentence, life imprisonment. See S.D.C.L. §22-6-1 (1980).

Second, unlike in Beck, the trial court in this case did instruct the jury they could find the defendant guilty of the necessarily lesser included offenses of first degree manslaughter and second degree manslaughter. This case did not involve the question at all decided in Beck of whether the jury could be prohibited from considering necessarily included offenses in a murder charge.

Third, unlike in Beck, second degree murder is not a necessarily included offense of first degree murder in South Dakota. As stated by the South Dakota Supreme Court: "The jury verdict convicted appellant of the offense of second degree murder, an offense that he was never charged with and which has distinctly different elements than first degree murder." App. to Pet., A-5. In contrast to first degree murder, which requires premeditated intent to kill (S.D.C.L. §22-16-4) [1979]), second degree murder, which the jury was instructed on in this case, is defined:

> Homicide is murder in the second degree when perpetrated by any act imminently dangerous to others and envincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual. [S.D.C.L. §22-16-7 (1980)].

As pointed out by the South Dakota Supreme Court in State v. Reddington, 64 N.W. 170, 173 (SD 1895), the South Dakota statute making homicide a murder if caused by an act imminently dangerous to others and evincing a depraved mind was adopted from a New York statute. Also as stated in Reddington:

> The rule is general, almost imperative, that where one state adopts the statute of another state it takes it impressed with the meaning and construction which has been judicially given to it at the time of its adoption. [Id. at 173; see also S.D.C.L. §2-14-13 (1939)].

Prior to its adoption in South Dakota, the statute had been construed by the highest judicial court of New York in Darry v. People, 10 N.Y. 120, 4 N.Y.S. 137 (N.Y. 1854), to require an act which puts the lives of more than one person in jeopardy. See also: State v. Mitchell, 188 P.2d 88 (Wash. 1947);

Massie v. State, 533 P.2d 186 (Okla. 1976); State v. De Santos, 553 P.2d 1265 (N.M. 1976); Gray v. State, 73 So. 583 (Fla. 1916).

Therefore, S.D.C.L. §22-16-7 is not a necessarily included offense of S.D.C.L. §22-16-4. It is entirely possible to deliberately kill one person without doing or intending an act endangering more than one person.

Fourth, unlike in Beck, there was not evidence presented at the trial in this case which warranted an instruction to the jury on second degree murder under S.D.C.L. §22-16-7. There was not sufficient evidence, in fact the evidence was nonexistent, that the defendant committed an act which endangered more than one person in particular. See App. to Pet., A-1 to A-2.

For this last reason, Hooper v. Evans, ___U.S.___, 72 L.Ed.2d 367 (1982),

supports, rather than conflicts, with the decision in this case.

b. This Case Is not in Conflict with Fare v. Michael C.

Petitioner argues this case conflicts with Fare v. Michael C., 442 U.S. 707 (1979). This argument ignores two things.

First, the South Dakota Supreme Court ordered the confession in this case suppressed not only because defendant was not advised there was a possibility he could be tried as an adult before the confession could be obtained, but also because the State deliberately delayed his appearance before a Judge to deprive defendant of an attorney prior to obtaining his confession. App. to Pet., A-8 to A-12. In suppressing the confession because of the deliberate delay, the South Dakota Supreme Court was enforcing a South Dakota Statute, S.D.C.L. §23A-4-1 (1978), which provides:

"A law enforcement officer making an arrest shall, without unnecessary delay, take the arrested person before the nearest available magistrate." The South Dakota Supreme Court did nothing more than this Court did in enforcing a similar federal statute in McNabb v. United States, 318 U.S. 332 (1943); Upshaw v. United States, 335 U.S. 410 (1948); and Mallory v. United States, 354 U.S. 449 (1957).

Second, in holding that before a juvenile's confession can be used in an adult criminal prosecution, the juvenile must be advised of the possibility that he could be tried as an adult, the South Dakota Supreme Court was construing and enforcing a South Dakota Statute, S.D.C.L. §26-8-57 (1978), barring evidence used in a proceeding under the juvenile laws from subsequent criminal prosecution. Consequently, there is no

issue in this case requiring interpretation of the United States Constitution as there was in Fare v. Michael C., supra.

2. The South Dakota Supreme Court Has not Rendered a Decision in Conflict with Decisions of Other State Courts of Last Resort on the Same Matter.

Since the South Dakota Supreme Court in this case was construing and enforcing a South Dakota statute in requiring a juvenile be advised of possible adult criminal prosecution before his confession can be used in a criminal prosecution, the decision in this case does not conflict with decisions of other states, since the matter decided by any other state court would necessarily require construing a statute of that state, not of South Dakota.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent prays that the Petition for Writ of Certiorari to the South Dakota Supreme Court be denied.

Respectfully submitted,

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